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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 63

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We do not attempt to consider all of respondent's arguments. We believe that most have been fully answered in our main brief, and some do not need any direct reply. We confine ourselves in this brief to a discussion of respondent's misinterpretations of our position and some of its other errors.

I

THE 1957 NIAGARA DEVELOPMENT ACT AND THE NECESSITY TO TAKE TUSCARORA LANDS

At the outset, we must correct respondent's misstatement of our position on the 1957 Act. In Point I of our main brief, we urged that (1) Congress'

authorization, in Public Law 85–159, of a project with capacity to utilize *"all"* the waters available under the Canadian treaty contemplated and comprehended production of 1,800,000 kilowatts of dependable capacity with a 60,000 acre-feet reservoir; (2) Congress superseded any limitations in the Federal Power Act inconsistent with the achievement of this Project; (3) Tuscarora lands are indispensable to a Project of this size and scope; and (4) Public Law 85–159 and the Federal Power Act, together with the objective necessity to use Tuscarora lands, thus constitute a sufficient grant of power to condemn those lands for the Niagara Project (FPC main brief, pp. 26–47, 51–54).

Respondent errs, therefore, when it poses, as the "heart of petitioners' argument", the question whether Congress was actually aware in August 1957 that Tuscarora lands would be required (Resp. brief, p. 48, pp. 43–44). As a separate proposition, we have also urged that Congressional knowledge of respondent's lands must be presumed and for that reason, too, there was implied authorization to condemn them; the Second Circuit so held. FPC main brief, pp. 48–51, 54–55; *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 893–894 (C.A. 2), certiorari denied, 358 U.S. 841. But wholly apart from such Congressional knowledge (actually shown or presumed), the power to condemn likewise arises from the very scope of Public Law 85–159 and the objective necessity to utilize part of respondent's land for the type of project authorized by Congress.

A. SCOPE OF PUBLIC LAW 85–159

1. Respondent (Brief, pp. 38, 40, 41) quotes and paraphrases the conclusion of the District of Columbia Circuit that the Niagara Development Act did no more than direct the issuance of a license and select the licensee. However, respondent utterly fails to confront the overwhelming record of hearings, reports, and debates, cited by the Government, which demonstrate that the premises of the court below were erroneous. To take one central fact, the court of appeals apparently believed that the pump-storage reservoir in suit was never mentioned to Congress (R. 426). On the contrary, we have shown irrefutable Congressional knowledge and contemplation of the pump-storage reservoir, its indispensable role in the project plans, its approximate location, and the alternative proposed sizes culminating in the 60,000 acre-feet reservoir eventually licensed (FPC main brief, pp. 30–36). We think it is clear that Public Law 85–159 contemplated the 60,000 acre-feet reservoir (and the other project works) as part of a project with 1,800,000 kilowatts of dependable capacity, *i.e.*, "capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." Section 1(a) of Public Law 85–159.

It is equally clear that Congress in 1957 approved the engineering plan, resolved all major issues relating to the Niagara Project, superseded any contrary provisions in the Federal Power Act, and intended to make certain that this long-awaited development would go forward without delay or qualification

(FPC main brief, pp. 36–41). Congress did contemplate that the license would be issued under the Power Act and the needed property would be acquired under the condemnation provisions of that Act (FPC main brief, p. 38; Resp. brief, pp. 40–41). But just as the Power Act standards for choice of a licensee were superseded by Congress (which respondent concedes), so were any other provisions which conflict with or hinder a development of the type, size, and scope directed by Congress.

2. As we have indicated, respondent has for the most part ignored the seven-year record of legislative consideration leading to Public Law 85–159. However, it has, mainly in the relative obscurity of its footnotes, made certain errors which should be corrected:

(*a*) One such statement is that the 1957 committee reports spoke of smaller reservoirs, with 22,000 or 30,000 acre-feet storage capacity (Resp. brief, p. 44, n. 24). However, the 1957 reports themselves stated that these were earlier plans (by the Bureau of Power and the Corps of Engineers) which had been superseded after the Schoellkopf disaster in June 1956. The reports also stated explicitly that the new plans were those of the New York Power Authority and that the dependable capacity was being increased to 1,800,000 kilowatts on a 17-hour basis, along with the "pump-storage and pumping-generating facilities" required "to achieve this amount of firm capacity". S. Rept. 539, 85th Cong., 1st Sess., pp. 5–6; H. Rept. 862, 85th Cong., 1st Sess., p. 7; quoted in FPC main brief, p. 34, fn. 21.

(*b*) Another inaccuracy is the statement that Exhibits 191 and 218, showing the Power Authority's plans for the enlarged project after the Schoellkopf disaster, are not part of the legislative history of the Niagara Development Act, and that a Power Authority witness "was unwilling to testify that any member of Congress ever had read the brochures" (Resp. brief, pp. 52–54). In the first place, the witness cited did explicitly testify that, at the 1957 Hearings, every member of the Senate Subcommittee looked at Exhibit 191 (R. 264, 271). The hearing transcript discloses that the chairman, Senator Kerr, inquired about the very map in Exhibit 191 which shows the enlarged reservoir (R. 265—see FPC main brief, p. 35, fn. 22). Independent confirmation is provided by the above-cited 1957 committee reports which referred to the Power Authority's plans and set forth the new figures for installed and dependable capacity—presumably taken from Exhibit 191 (R. Ex. 40).

As to the size of the pump-storage reservoir required by the augmented capacity, respondent makes no mention of Exhibit 13 (R. Ex. 1–9) which was introduced at the Congressional hearings in 1957 (R. 3) and which demonstrated that 60,000 acre-feet were needed for 1,800,000 dependable kilowatts on a 17-hour daily basis (R. Ex. 4–6). This size reservoir was also listed among the specifications for the Project in Exhibit 218 (R. Ex. 132), submitted to the House Committee on Public Works and to all Senators and Representatives in July 1957 (R. 244–250, 386–387; R. Ex. 151–154). The evidence that these exhibits were actually before Congress during consideration

of the Niagara Development Act brings them within the legislative materials available to courts, which properly utilize "every relevant aid to construction": *United States* v. *Dickerson*, 310 U.S. 554, 562; *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543–544.[1]

(*c*) Still another error is the use of the statement of Senator Chavez in 1957, "No dams or provisions for storage of water are necessary", as relevant here (Resp. brief, pp. 44–45, n. 24). As we have shown, and the Senator himself explained, the Niagara River provides a natural flow and drop; no artificial means were required for the flow and drop (FPC main brief, p. 36). That is all that he meant. It is difficult to believe that respondent, by this reference, really

[1] In *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627, 630–631 (E.D. Mich.), affirmed, 172 F. 2d 953 (C.A. 6), the district court accepted affidavits of a member of the Senate Appropriations Committee and the general counsel of the Reconstruction Finance Corporation which showed, as a fact, that the committee had utilized a communication from the agency in preparing the bill. Cf. *Gardner* v. *The Collector*, 6 Wall. 499, 511; *United States* v. *Webster*, Fed. Cas. No. 16,658.

Such evidence of what a committee (or Congress) actually *did or had before it* is entirely different from the inadmissible use of later testimony by individual Congressmen concerning their intent at the time of passage or the later use of material never before Congress (as in the cases cited in respondent's brief, pp. 53–54). Moreover, in this case Congress was aware that the new Project plans were those of the Power Authority. S. Rept. 539, 85th Cong., 1st Sess., p. 6. The plans would therefore be material even in the absence of Congressional knowledge of them in 1957, since Congress may authorize such developments on the basis of plans in the process of preparation. See *infra*, pp. 11–12.

seeks to question the legislative purpose to authorize and require the pump-storage reservoir.

(*d*) Finally, we refer to the incorrect statement that there was "uncontradicted testimony" at a House hearing in 1956 that Niagara Mohawk Company owned all the property needed for the Project (Resp. br., p. 44, fns. 23, 24). We have already cited the contradictory testimony given at the same hearing by Power Authority counsel (FPC main brief, p. 50), and it is now quoted in the footnote below.[2]

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[2] Mr. DONDERO. If the State of New York obtains the right to develop this power you must either buy or condemn from the private power companies the property which they now own and use for the same purpose?

Mr. MOORE. No; they are not using it for the same purpose. The power companies acquired a lot of land with the idea of using it for the same purpose but the property the private companies now use for power purposes is different from those that will be used for this development. * * *

* * * * *

Mr. DONDERO. Just a moment. Suppose what you are saying is true. You would still have to condemn or buy the property which they own to build a plant at Lewiston. Is that right?

Mr. MOORE. We would have to condemn or buy from private people the land necessary for this project. In some cases it is Niagara Mohawk, and I assume in some cases others.

Mr. DONDERO. When you say "private people" you mean private power companies?

Mr. MOORE. They may be individuals, or farmers, or school teachers, or anything.

Hearing on Niagara Power before the House Committee on Public Works, 84th Cong., 2d Sess., pp. 27–28. R. 260–261. Moreover, the power to condemn was never an issue (FPC main brief, pp. 50–51).

B. THE NECESSITY TO USE TUSCARORA LANDS.

Respondent seeks now to rely upon a statement of the Federal Power Commission, in January 1958, that "other lands are available for reservoir use" (R. 395), on the ground that "the legal relationships between the parties remain unchanged" (Resp. brief, p. 47, fn. 26, p. 50). But the indispensability of Tuscarora lands to the Niagara Project contemplated by Congress is not a matter of "legal relationships", but of objective fact. The evidence leaves no doubt, and the Commission has found, that respondent's lands *are* essential to attain a 60,000 acre-feet reservoir, without which, in turn, the Niagara Project will not have the dependable capacity intended by Congress (FPC main brief, pp. 43–47).[3] If respondent's lands are not included, the Niagara Project will fall seriously short of the goals set for it by Congress.

In its brief in opposition to certiorari, respondent urged that the Commission's conclusion to this effect was "sheer dicta", not that it was untrue (Brief in Opposition, p. 16, fn. 5). Nevertheless, respondent now claims (Brief, pp. 49–50) that its lands appear essential only because the Power Authority voluntarily abandoned all alternatives. The record is flatly to the contrary; respondent's lands appear essential be-

[3] In our view, it is irrelevant that this objective fact was not definitely established on the record at the time the Niagara Development Act was passed (August 1957), at the time the license was initially issued (January 1958), or at the time of the interlocutory decision of the court below (November 1958). It is enough that it was definitely established and found by the time of the final ruling below.

cause they *are* essential. The reservoir location is limited to the north by the Niagara escarpment, to the south by the New York Central line and yards, and to the east by the surge basin between the power-plants. Of the many alternatives studied, all but one were properly eliminated because of engineering and topographical problems. And the Exhibit 165 plan was found to be an unreasonable alternative, because of community disruption, substantial delay, and great cost (FPC main brief, pp. 43–46). While respondent slights the natural and technical limitations, it is of course only a great stroke of natural good fortune which makes possible this enormous project—the fact that the Niagara River drops 314 feet in a few miles. Similarly, the reservoir location has been determined mostly by natural conditions and in minor part by the community development in the area. This is not a project in which there is a relatively free choice of locations; the very special character of the geography in the Niagara region dictates the placement of the reservoir.[4]

C. THE LAW GOVERNING THE TAKING OF INDIAN LANDS

Accordingly, respondent's argument on the Niagara Development Act must boil down to its proposition that condemnation of Indian lands—no matter what

[4] The only specific allegation by respondent is the Power Authority's failure to consider raising the dikes of a reservoir covering a smaller area (Brief, p. 49, fn. 29). The Commission has found that raising the dikes to achieve the required storage of 60,000 acre-feet "is technically infeasible and is economically undesirable" (R. 488).

the need for those lands or how great the damage to the authorized project by a failure to include them—can only be based upon "the most plain and unequivocal statutory language", "the most express and unambiguous language of Congress" (Resp. brief, pp. 23, 31–33, 41–42). This is not, and has never been, the governing law.

1. Respondent's purported rule is refuted by one of the very cases which it cites. In *Seneca Nation of Indians* v. *Brucker*, 262 F. 2d 27 (C.A. D.C.), certiorari denied, 360 U.S. 909, the two statutes involved—authorizing the Allegheny Project and appropriating funds for it—made no mention whatever of the Indian lands. The legislative history indicated Congressional knowledge of the situation but this was precisely the "unexpressed intention", without statutory language, which respondent (Brief, p. 34) believes to be inadequate.[6]

2. Moreover, we have already shown that, under rulings of this Court, Congressional authorization to take Indian lands is established by the objective necessity for such lands to carry out a project specifically authorized by Congress. *Henkel* v. *United States*, 237 U.S. 43, 49–50; *Spalding* v. *Chandler*,

[6] To the same effect as *Seneca Nation of Indians* v. *Brucker* are *United States* v. *21.250 Acres of Land*, 161 F. Supp. 376 (W.D. N.Y.); *United States* v. *5677.94 Acres of Land*, 152 F. Supp. 861, 162 F. Supp. 108 (D. Mont.). *United States* v. *2405.32 Acres of Land, etc.*, 160 F. Supp. 193 (D. S. Dak.), cited by respondent (Brief, p. 33, fn. 16), is to the contrary. Aside from its minority position, the latter case did not involve the instant problem, where the taking of Indian lands is shown to be indispensable for a specific project authorized by Congress.

160 U.S. 394, 406–407; *Missouri, Kansas & Texas Ry. Co.* v. *Roberts*, 152 U.S. 114, 117–118 (FPC main brief, pp. 52–54). Respondent attempts to distinguish *Henkel* on the ground that the transfer by the Indians was voluntary (Resp. brief, pp. 46–47) but, upon its own theory that *any* alienation must be federally-confirmed (Resp. brief, pp. 28–30, 59–60), that would not remove the necessity for Congressional approval and the significant factor is that the Court found such approval in the general terms of the Reclamation Act and the necessity to use the lands, not in "express" or "unequivocal" reference to Indian lands.

Respondent also asserts that the statutes in *Spalding* and *Missouri, Kansas & Texas Ry.* granted specifically defined territory, as compared to the alleged general objective of the Niagara Development Act (Brief, p. 47). The reverse is true. In *Spalding*, Congress granted to the State of Michigan a canal route through public lands according to "the line of the survey heretofore made for that purpose, *or such other route between the waters above and below said falls* [St. Mary's Falls], *as under the approval of the Secretary of War may be selected*" 10 Stat. 35; 160 U.S. at 406 (emphasis added). The grant in *Missouri, Kansas & Texas Ry.* was for a railroad line from Fort Riley, Kansas, to the state line with a view to an extension to Fort Smith, Arkansas, along with grants of nearby sections of land to be definitely selected "when the line of said road is definitely lo-

cated". 14 Stat. 289; 152 U.S. at 114.[6] Despite the contingent nature of these grants, and the failure to mention Indian lands, the grantees were held authorized to condemn Indian lands essential for the execution of the canal and railroad.

In the present case, when Congress authorized the Niagara Project, its location had been developed and mapped with near certainty—far greater than in the two cases we have just discussed—and the power to condemn all indispensable lands, including Indian lands, was granted *a fortiori*.[7]

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[6] An example of recent legislation on the basis of contingent plans is that of the Rivers and Harbors Act of 1945, 59 Stat. 10, 17, authorizing a development on the Alabama-Coosa River "substantially in accordance with the plans being prepared by the Chief of Engineers with such modifications thereof from time to time as in the discretion of the Secretary of War and the Chief of Engineers may be advisable for the purpose of increasing the development of hydroelectric power."

[7] Respondent also states, at this part of its brief, that the grants in *Spalding* and *Missouri, Kansas & Texas Ry.* involved territory held in the name of the United States (Br., p. 47), although elsewhere it asserts (Brief, pp. 26, 68–69) that the Congressional consent needed for taking of Indian lands is the same, regardless of the Government's interest. We have urged that a lesser authorization would suffice in this case because no treaty rights are involved (FPC main brief, pp. 55–57); and, as a matter of construction of the Federal Power Act, we have urged a distinction between Indian lands in which the United States has a real property interest, and others. But certainly respondent's fee title does not make it more immune from federal condemnation than Indian groups the title to whose land rests in the United States.

Respondent's two further grounds for distinguishing *Spalding* (Brief, p. 47, fn. 26) are without basis. First, it says, the lands in *Spalding* were essential to the grant; but the same is true here. Second, the alleged notice to Congress that the

3. Nor may the power to condemn Tuscarora lands needed for the Niagara Project be defeated by the various maxims cited by respondent. Thus, the proposition that general acts do not apply to Indians without a clearly manifest intention to include them has been utilized, in the cases cited by respondent (Resp. brief, pp. 32–33, 41–42), to relieve Indians from the burdens of general immigration and tax laws as well as to withhold the right to vote from them. It has no bearing, however, upon a specific statute dealing with a specific development in a specific area, the achievement of which will be seriously thwarted unless some Indian lands are included.

Second, respondent says that laws affecting Indians are to be liberally construed for their benefit and protection (Resp. brief, pp. 35–36, 42). Actually, as formulated in the cases cited, this canon directs liberal construction of treaties or statutory grants *to* Indians, not of all laws affecting them. The immediate answer, then, to application of that rule to this case is that the Tuscarora lands were never involved in a treaty or grant but were purchased by the tribe with its own funds (FPC main brief, pp. 13–15, 55).

In addition, the rule of liberal construction for Indians must be balanced against—and may well be out-

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canal would run through Indian lands was shown only by an unrelated statute passed two years before the canal grant, in which Congress referred to the Indian lands, 160 U.S. at 406. In this case, as we have seen, there is similar notice from statutes dealing with civil and criminal jurisdiction over the Tuscaroras and other New York Indians, passed in 1948 and 1950. See FPC main brief, p. 55, fn. 40.

weighed by—other significant policies. Thus, treaty rights in land are not acquired by Indians without express Congressional authorization. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 278–279; *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 177, 179. So also, in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 104–106, this Court held that the Secretary of Interior did not have the power to grant Indians permanent rights in the Alaskan fisheries in the absence of unambiguous legislation. The reason was that the United States must be assumed to retain the "complete power to protect, improve and regulate for the good of all our people these unrivalled sea fisheries with their wealth of food".

Hynes v. *Grimes Packing Co.*, also disposes of respondent's third maxim, *i.e.*, that grants of public property or the relinquishment of public interests are to be construed strictly in favor of the Government. For it is apparent that an Indian reservation interest or use is not equivalent to the public Governmental interest intended to be protected by this rule. Indeed, to paraphrase *Hynes*, the potentiality of a "wealth" of electrical energy from Niagara is an "unrivalled" national resource and every presumption should be taken in favor of the Government's power to develop it fully "for the good of all our people." In all fairness, it is difficult to see any impairment of public interest, or undue burden upon the relatively few members of respondent Nation, in the payment of full just compensation for some of its lands, particularly since the acquisition of alternative lands would serve

all of the purposes to which the lands in suit are devoted. On the other hand, exclusion of respondent's lands would gravely diminish the electric power available, to all the people of the area, from the great Niagara Project.

II

THE FEDERAL POWER ACT'S "RESERVATION" PROVISO AND THE TUSCARORA LANDS

On this aspect of the case, our position is that the term "reservation" has a special meaning in the Federal Power Act, comprehending only lands owned in fee by the United States or in which the United States has some real property interest. This is supported by the Act's definition of "reservation", its jurisdictional bases for licensing projects, its compensation provisions, and its history. Since the Tuscarora lands are owned by respondent in fee simple, condemnation of them or their inclusion in the Niagara Project is not limited by the Power Act's proviso covering inclusion of "reservations" (FPC main brief, pp. 58–73).[8]

[8] Respondent does not expressly dispute that it holds the land needed for the reservoir in fee simple and that the United States has no real property interest in it. See Resp. brief, pp. 55–56. Nevertheless, in its statement of facts (Brief, p. 6 and fn. 3), respondent states that the Secretary of War first acquired the land "in trust" and suggests that the fee simple transfer to the Nation was an "historical accident". Actually, the purchase of the lands was upon the initiative of the Nation itself (Resp. brief, p. 5). The Secretary of War did not receive the lands to hold generally in trust, only as temporary escrowee "in Trust to and for the only proper use, Benefit and Behalf of them the said Tuscorora Nation of Indians and their Assigns forever, and in Trust that he, the said Henry Dear-

A. Respondent seeks to defeat this construction of the Power Act primarily by posing certain alleged untoward consequences. First, it states that, if the Tuscarora lands are not included within the "reservation" proviso of Section 4(e), then the Power Act does not contain any authorization to take those lands. To the contrary, the rule is that the specification by Congress of a special condition for taking certain Indian lands shows Congressional intent that use of Indian lands generally are included in the grant. *Kindred* v. *Union Pacific R.R. Co.*, 225 U.S. 582, 596. Those Indian lands not covered by the 4(e) proviso and needed for a licensed development (like respondent's) may be taken under the general condemnation power in Section 21 of the Power Act, as is the case with other needed lands. The Power Act, in short, contains within its four corners sufficient Congressional authorization to take and use all types of Indian land.

B. Second, respondent asserts that our construction of the Power Act "is contrary to 175 years of dealings between the Federal Government and Indian tribes, which experience forms the legal background of the Federal Power Act" (Resp. brief, p. 68). Aside from the admitted fact that the term "reservation" has been used in different senses by Congress (FPC main brief, pp. 71–72; Resp. brief, p. 68, fn. 47), there is not one jot of evidence that the practices of Indian law were the context in which the Power

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born and his Heirs grant and convey the same in Fee Simple or otherwise to such person or persons as the said Tuscorora Nation of Indians shall at any time hereafter direct and appoint. * * *" (R. Ex. 193). See FPC main brief, pp. 13–15.

Act was drafted and written. As we have shown in our main brief, Congress was explicitly dealing with the problems of power development on navigable streams (under the interstate and foreign commerce power) and in the public domain and federal lands (under the Property Clause) (FPC main brief, pp. 65–68).

Respondent has sought to supply the missing link by the conjecture that Section 4(e) of the Power Act was adapted from the Acts of February 15, 1901, and March 4, 1911, dealing with rights-of-way over Indian and other reservations, and that the latter acts had been interpreted to include Indian reservations regardless of the Government's real property interest (Resp. brief, pp. 65–66). Neither of these premises is warranted. A search of the legislative history of the Power Act discloses no indication that the 1901 and 1911 statutes were relied upon. The earliest bill leading to the Power Act which dealt with reservations was written from an entirely different point of view, and showed most clearly that the power over federal property was being exercised. It would have authorized power developments upon "any part of the lands and other property of the United States (including Alaska), reserved or unreserved, including lands in national forests, national monuments, military and other reservations, not including national parks." H.R. 16673, 63d Cong., quoted in H. Rept. 842, 63d Cong., 2d Sess., pp. 1–2. Significantly this bill, in 1914, already contained a version of the 4(e) proviso in language similar to the Federal Power Act,

but quite different from the 1901 and 1911 acts upon which respondent relies.[9]

The lone opinion of the Solicitor of the Interior Department dealing with the term "reservation" in the 1901 and 1911 Acts was written and published in the 1940's (58 Interior Decisions 85, 99)—long after Section 4(e) took shape—and could not have been known to or adopted by Congress in the Federal Power Act of 1920. Moreover, its correctness is open to serious doubt. While the opinion failed to cite any legislative history, the committee reports for the 1911 Act explicity stated that its object was to provide rights of way "across the public domain and national forests"—which would seem to exclude an Indian reservation held by a tribe in fee simple. S. Rept. 967, 61st Cong., 3d Sess., p. 1; H. Rept. 2177, 61st Cong., 3d Sess., p. 1. And the Solicitor's companion view that the term "reservation" in those Acts also included allotted lands (58 Interior Decisions 85 at 99–100) was expressly overruled in *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206.[10]

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[9] The form of the 4(e) proviso in H.R. 16673 was as follows: "* * * *Provided*, That such leases shall be given within or through any of said national forests, military or other reservations only upon a finding by the chief officer of the department under whose supervision such forest, national monument, or reservation falls that the lease will not injure, destroy, or be inconsistent with the purpose for which such forest, national monument, or reservation was created or acquired * * *". H. Rept. 842, p. 2. Compare Resp. brief, p. 65.

[10] Moreover, the Solicitor's conclusion relied upon by respondent was essentially dictum, since he had already pointed out that a provision of another act specifically authorized rights-of-way through any Indian lands for a general tele-

C. Turning to respondent's reliance upon the language of the Power Act, it urges that Section 3(2) (defining "reservations") sets forth four wholly distinct categories of land and that the phrase "other lands and interests in lands owned by the United States" does not modify or bear any relation to the terms immediately preceding—"national forests, tribal lands embraced within Indian reservations, military reservations" (Brief, pp. 63–64). This is refuted, we believe, by the plain meaning of "other", by the dominant context of federal ownership throughout Section 3(2), and by the legislative history of the definition (FPC main brief, pp. 59–62).[11] And as we have also shown, the federal guardianship is not an interest in lands within these provisions (Resp. brief, pp. 69–70; FPC main brief, pp. 63–64).

Respondent (Brief, p. 74) incorrectly states that Section 10(e) of the Power Act, providing for annual charges, distinguishes "between Federal 'lands or

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phone and telegraph business. 58 Interior Decisions at 98–99. In discussing the Acts of February 15, 1901, and March 4, 1911, he stated that their authority would be needed only in the event telephone and telegraph lines were sought for private use, as distinguished from general public service. 58 Interior Decisions at 99.

[11] That Congress originally included national monuments and national parks in the statutory definition, and then removed them, does not support respondent's view (Brief, p. 64) but rather militates against it. If the categories in 3(2) were wholly separate, Congress might have thought it sufficient to achieve the objective of eliminating jurisdiction over parks and monuments by eliminating those words from the definition section. Instead, Congress in 1921 added a special proviso to Section 4(e) to that end (41 Stat. 1353) and did not amend the definition until 1935 (49 Stat. 838).

other property' * * * and 'tribal lands embraced within Indian reservations' ". On the contrary, the proviso in Section 10(e) containing a special condition for "tribal lands" clearly modifies the general provision at the beginning of Section 10(e) dealing with compensation for the use of Government "lands or other property". This too demonstrates that the "tribal lands" given special treatment in Section 10 (e), and in the 4(e) proviso, are those in which the United States has a real property interest (FPC main brief, pp. 68–71).[12]

D. Finally, respondent's extreme position is that our construction of the Power Act would exclude "the bulk of all Indian reservations in the United States" from the coverage of the licensing provisions of Section 4 of the Power Act. Its reasoning is that, because the Indian right of occupancy to reservations on the public domain is generally compensable, such reservations cannot be freely disposed of by the United

[12] Among its conditions, Section 10(e) provides that, if an Indian tribe has organized under the Wheeler-Howard Act, annual charges for use of tribal lands in its reservation are subject to its approval. Respondent states that, if the Tuscarora Nation had so organized, it would be able to prevent any taking of its lands by refusing to approve the annual charge under Section 10(e) (Resp. brief, p. 74, fn. 54). In the first place, respondent's lands would still not constitute a reservation covered by these provisions. In any event, it is significant that Congress in 1920 defeated an amendment to Section 4(e) which would have given a veto power to Indians upon treaty reservations. 59 Cong. Rec. 1534, 1535–1536, 1564–1570; H. Rept. 910, 66th Cong., 2d sess., p. 8. Certainly, the power to approve the reasonableness of rents may not now be turned into the rejected veto—and for a non-treaty reservation.

States; hence, it argues, they do not constitute "Property belonging to the United States" (Const., Article IV, Section 3) and would not be included if the Power Act's jurisdiction to issue licenses upon "reservations" comes only from the Property Clause (Resp. brief, pp. 70–74).

The short answer to this theory is that respondent has confused the constitutional sources of Congressional power with the wholly separate constitutional requirement of just compensation for private property taken for public use. That the Fifth Amendment requires compensation does not shed any light upon the source of the power being exercised when Congress determines upon a public use, and authorizes that it be carried out through the federal power of eminent domain. Cf. *United States* v. *Carmack*, 329 U.S. 230, 236–239; *Kohl* v. *United States*, 91 U.S. 367, 371–374.

Congress may, for example, determine upon a river development under its power to regulate commerce. If an individual had earlier been granted certain vested rights in the area, they may not be taken without just compensation, but the power of Congress to terminate the grant and embark upon its own use is undoubted. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 334–345; cf. *James* v. *Campbell*, 104 U.S. 356, 358 (taking of patent rights). Similarly, Congress has the constitutional power, under Article IV, Section 3, to develop the resources upon federal lands and to condition the use of federal property. The Fifth Amendment would protect any private vested rights in that federal property, be they

vested Indian right of occupancy, licenses under the Power Act, franchises, leases or other contractual obligations. But the status of the remaining federal real property rights as federal property is not altered by the existence of such private vested rights and the power of Congress to dispose of the federal property rights under the Property Clause is not affected—except that just compensation will have to be paid for the private rights necessarily disposed of along with the federal property.[13]

The unsoundness of respondent's approach is demonstrated by the consequences for the analogous non-Indian situations. We cannot believe that, after a lease or a power license is issued on the public domain, Congress must look beyond Article IV, Section 3, to the commerce or other powers, in order to condemn such a grant so that it may be disposed of along with the remaining public property rights. Likewise, Indian reservations on the public domain, although compensable, are subject to the power of Congress to devote the whole of the public domain to other uses.

Respondent states that the Power Act's licensing of projects upon Indian reservations is simply based upon the power to regulate commerce with Indian

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[13] Respondent has signally failed in its attempt to distinguish the cases cited in our main brief, p. 65, fn. 47, which show that ownership by the United States of legal or trust title makes an Indian reservation federal property under Article IV, Section 3 (Resp. brief, p. 73, fn. 52).

tribes (not adverted to by Congress), and, therefore, all Indian lands are covered, regardless of the Government's property interest. We have shown, however, that this theory is controverted by the Act's legislative history (FPC main brief, pp. 66–68). Moreover, as respondent points out (Brief, pp. 75–76), the federal guardianship power over Indians is to be exercised to promote their own welfare; indeed, a guardianship use of Indian lands does not lead to payment of compensation to the Indians. In contrast, under the Power Act, developments are contemplated which ordinarily will not be primarily for the benefit of the Indians, and full compensation is to be paid. It is obviously more consonant with the expressed intent of Congress in the Power Act to consider condemnation under that Act as an exercise of the general powers over commerce and over the federal domain, than to view it as an exercise of Congressional guardianship powers.

Accordingly, just as Indian lands not owned by the Government do not constitute a "reservation" for Power Act licensing purposes, so condemnation of those lands does not require the special treatment afforded "reservations" in Section 4(e) of that Act.

CONCLUSION

For the foregoing reasons, and those stated in our main brief, we respectfully submit that the judgment

below should be reversed and the Commission's issuance of the license should be affirmed.

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